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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF SAFECO TITLE INSURANCE COMPANY

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals (Pet. App. A, pp. 1a-44a) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. C, pp. 47a-66a) are reported at 226 N.L.R.B. 754.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, pp. 45a-46a) was entered on June 29, 1979. On September 14, 1979, the Chief Justice extended the time in which to file a Petition for Writ of Certiorari to and including October 27, 1979. The Petition for Writ of Certiorari was filed on October 24, 1979, and was granted on January 7, 1980 (A.47). The jurisdiction of the Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

This case involves Section 8(b) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b), which provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents. . .
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is. . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .
>
> *Provided, further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . .

QUESTION PRESENTED

Whether consumer picketing by a labor union at the premises of a neutral employer, directed at the product of a firm with which the union has a dispute, is forbidden by Section 8(b)(4)(ii)(B) of the National Labor Relations Act when the predictable result of the picketing, if successful, will be to persuade the neutral's customers to cease dealing with it altogether.

STATEMENT

This case was presented to the National Labor Relations Board (the "Board") by means of a written stipulation and exhibits (A.12-43; R. Vol. I Part 7). The facts thus are undisputed.

The Primary Employer.

Safeco Title Insurance Company ("Safeco Title"), a California corporation, is engaged in the title insurance business in the State of Washington (A.7, 11, 14).

The Neutral Employers.

Safeco Title has contractual arrangements (reflected in an "Agency Contract") with five separate and independent Washington corporations, referred to collectively herein as the

"Land Title Companies."[1] Each "Agency Contract" provides that the Land Title Company can solicit, execute and deliver, in the name of Safeco Title, "title commitments" (including policies of title insurance) in its particular county in the State of Washington (A.15-20, 25-34; R. Vol. I, Part 7, Ex. 3, 4, 5, 6, 7). The agency contract provides that Safeco Title shall underwrite certain defined losses (A.31; R. Vol. I, Part 7, P.8 of Ex. 3, 4, 5 and 7.). The Land Title Companies pay to Safeco Title 12½ percent of the premium received for each title insurance policy issued under Safeco Title's name (A.30; R. Vol. I, Part 7, P.7 of Ex. 3, 4, 5 and 7). The Land Title Companies derive from 90 to 95% of their income from the issuance of such policies (A.15-20).

The steps taken by the Land Title Companies with respect to the issuance of title insurance are as follows:

(1) A request for issuance of a title report is received;

(2) A search of the title is conducted (under the agency contract, and under Washington state law (Rev. Code Wash. 48.29.040), each "agent" must maintain complete tract indices relating to real estate transactions in its particular county);

(3) A title report is issued along with a commitment to insure, setting forth the following information with respect to the property: taxes, easements, judgments, liens and any title defect; and

(4) On conveyance of the property, the title insurance policy is issued (A.15-20).[2]

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[1] The companies involved are: Land Title Company of Pierce, County, located in Tacoma, Washington; Land Title Company of Snohomish County, located in Everett, Washington; Land Title Company of Kitsap County, located in Bremerton, Washington; Land Title Company of Cowlitz County, located in Longview, Washington; and Land Title Company of Clark County, located in Vancouver, Washington (A. 6-7).

[2] For a further explanation of the title insurance business, see Johnstone, *Title Insurance*, 66 Yale L.J. 492 (1957); Quiner, *Title Insurance and the Title Insurance Industry*, 22 Drake Ins. L. Annual 711 (1973); S. Huebner, K. Black & R. Cline, Property and Liability Insurance 330-341 (1968).

The Labor Dispute.

On July 17, 1974, Respondent Retail Store Employees Union Local 1001 (the "Union") was certified by the Board as the collective bargaining representative of certain employees of Safeco Title at its Seattle office (A.14; R. Vol. I, Part 7, Ex. 2). Following a period of collective bargaining, the Union commenced a strike against Safeco Title on November 18, 1974 (A.14).

Picketing by the Union at the Land Title Companies.

On different dates during the strike against Safeco Title, the Union picketed the premises of the Land Title Companies, with picket signs reading:

"SAFECO NON-UNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001"

(A.16-20)

The Union also passed out handbills urging recipients to "Boycott Safeco Insurance" naming several "Safeco Group Companies" other than Safeco Title (A.21, 43).

The picketing and handbilling did not result in any work stoppage, or any interference with deliveries to the Land Title Companies (A.16-20).

Unfair Labor Practice Proceedings.

After unfair labor practice charges were filed by one of the Land Title Companies and by Safeco Title, the General Counsel of the Board issued a complaint alleging that the picketing of the Land Title Companies by the Union violated Section 8(b)(4)(B) of the Act (A.2-10). The Union filed an answer denying the commission of an unfair labor practice (A.11-12). All parties waived a hearing before an Administrative Law Judge and entered into a stipulation of facts for submission directly to the Board (A.11-22). The Board accepted this stipulation (A.45-46), and held that the picketing

in question violated Section 8(b)(4)(ii)(B) of the Act and ordered the Union to desist therefrom (Pet. App. C, pp. 59a-62a).

In reaching this conclusion, the Board considered the Union's argument that the decision in *Tree Fruits*[3] permitted the Union's picketing (Pet. App. C, p. 58a). The Board, however, had earlier held in *Dow Chemical*[4] that the *Tree Fruits* doctrine was "not applicable where the picketing is reasonably calculated to induce customers not to patronize the neutral parties at all" (Pet. App. C, p. 58a). In the present case, the Board found:

> The facts of the present case indicate that a successful boycott of Safeco insurance policies would predictably involve a virtually complete boycott of the Land Title Companies. Between 90 and 95% of the Title Companies' gross revenue is derived from the issuance of Safeco policies. The remainder is derived from sources which are largely ancillary to the issuance of title insurance policies, *e.g.*, title research and escrow services. Respondent's activities therefore had the predictable result of dragging the Land Title Companies into its dispute with the primary employer, Safeco. The Land Title Companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business if the consumer appeal were successful. We find, therefore, that Respondent's consumer appeal constitutes coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Pet. App. C, p. 59a.

[3] *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 (Tree Fruits Labor Relations Committee, Inc.)*, 377 U.S. 58 (1964) (hereinafter cited as "*Tree Fruits*").

[4] *Local 14055, United Steelworkers (Dow Chemical Company)*, 211 N.L.R.B. 649 (1974), *enforcement denied sub nom. Local 14055, United Steelworkers v. NLRB*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded sub nom. Dow Chemical Co. v. Local 14055, United Steelworkers*, 429 U.S. 807 (1976), *complaint dismissed on remand sub nom. Local 14055, United Steelworkers*, 229 N.L.R.B. 302 (1977) (hereinafter cited as "*Dow Chemical*").

The Union petitioned the Court of Appeals for the District of Columbia Circuit to review and set aside the Board's order, and the Board cross-applied for enforcement. The court of appeals, *en banc*, reversed the Board, holding that *Tree Fruits* dictated that, so long as the Union's picketing was structured to affect only the "struck product" (title insurance), the picketing was proper (Pet. App. A, pp. 21a-35a).[5]

SUMMARY OF ARGUMENT

Tree Fruits is not applicable to the present case. *Tree Fruits* involved carefully limited picketing in a context which bears no resemblance to the present case. None of the careful steps taken by the union in *Tree Fruits* were taken in the present case. In addition to the fact that the Union's picket signs did not carry a "consumer boycott" message, the neutral Land Title Companies did not simply act as retailers of a "product" purchased from Safeco Title. Moreover, due to the fact that the Land Title Companies derive nearly all their income from the issuance of title insurance policies under Safeco Title's name, the picketing in the present case would, if successful, result in a virtually complete boycott of them—a result *Tree Fruits* holds to be prohibited.

The *Tree Fruits* distinction is simply not workable in the present case for distinguishing protected from unprotected activity. As in other cases where "consumer product" picketing

[5] Due to the relationships between Safeco Title and the Land Title Companies, the Union argued before the Board and before the court of appeals that the Land Title Companies were "allies" of Safeco Title, as that term is used in the cases under the National Labor Relations Act (Pet. App. C, pp. 53a-54a; Pet. App. A, pp. 5a-6a). The Board rejected the Union's argument, and the court of appeals upheld the Board's decision (Pet. App. C, pp. 54a-58a; Pet. App. A, pp. 6a-11a). Since the Union has not petitioned for review of this aspect of the court of appeals' decision, the "ally" question is not presently before the Court.

would result in a broader boycott of the neutral employer, the *Tree Fruits* distinction breaks down. Accordingly, *Tree Fruits* should be confined to its facts and not extended to the present case. This limitation of *Tree Fruits* would not create an anomaly since it would recognize that consumer picketing directed to a substantial portion of the neutral's business would force the neutral to become involved in the labor dispute, whereas the picketing in *Tree Fruits* did not have this likelihood.

If *Tree Fruits* cannot be confined to its facts, it should be reconsidered since it will result in legalizing activity clearly intended by Congress to be prohibited. The legislative history of the 1959 Landrum-Griffin Amendments to the Act demonstrates that Congress intended to prohibit all secondary picketing. Attempting to distinguish between *Tree Fruits* picketing, and other forms of secondary consumer picketing is futile. All secondary consumer picketing should be recognized as prohibited since it inevitably calls for a general boycott of the neutral. The picket line, in and of itself, is a call for a general boycott, notwithstanding the precise language on the placards. This "signal aspect" of picketing has been recognized by the Court, and is utterly inconsistent with a stated claim by a union that its appeal is limited to the "struck product."

There is no merit to the Union's argument that the prohibition of secondary consumer picketing is an unconstitutional infringement of its First Amendment rights. Because picketing is largely conduct, and because its "signal aspect" contradicts any stated purpose to the contrary, Congress may constitutionally regulate it. When balanced against the right of the neutral employer to be free from the coercive effects of such picketing, the Union's right to so publicize its dispute with the primary employer must give way, particularly in view of the fact that other, more effective and less coercive, avenues remain open to it.

ARGUMENT

I. *Tree Fruits* Is Not Applicable To The Present Case.

In *Tree Fruits,* the Court held that, despite the literal language of Section 8(b)(4)(ii)(B) (and contrary to the views of most commentators[6]) Congress had not intended to prohibit narrowly circumscribed picketing of a retail store urging consumers not to purchase a particular product produced by employers with whom the union had a dispute. The Court distinguished the carefully limited picketing conducted there from a generalized appeal not to do business with the neutral employer.

The error of the court below was to indiscriminately apply *Tree Fruits* to the very different facts of the present case, resulting in "absurd and unintended results." *See Michigan v. Mosley,* 423 U.S. 96, 102 (1975). As the Court stated in *Armour & Co. v. Wantock,* 323 U.S. 126, 133 (1944), "general expressions transposed to other facts are often misleading." In order to determine whether *Tree Fruits* is applicable to the present case, the facts presented to the Court there must first be analyzed.

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[6] *See* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 1086, 1114 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 Minn. L. Rev. 257, 274 (1959); Fairweather, *An Evaluation of the Changes in Taft-Hartley,* 64 Nw. U.L. Rev. 711, 733 (1960); Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions,* 48 Geo. L.J. 327, 341 (1959); Ryan, *Recognition, Organizational and Consumer Picketing,* 48 Geo. L.J. 359, 369-70 (1959); *cf.* Fleming, *Title VII: The Taft-Hartley Amendments,* 54 Nw. U.L. Rev. 666, 688-93 (1960). *But see* Previant, *The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis,* 48 Geo. L.J. 346, 353 (1959).

The commentators did not change their view following *Tree Fruits. See* Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits,* 49 Minn. L. Rev. 479, 481 (1965); Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?,* 63 Mich. L. Rev. 682, 687 (1965); Note, *Consumer Picketing Under the Landrum-Griffin Amendments to the Taft-Hartley Act,* 12 U.C.L.A. L. Rev. 238, 244 (1964).

In *Tree Fruits* a union was on strike against certain employers which sold Washington State apples to the Safeway chain of retail stores in Seattle, Washington. The union decided to encourage consumers not to purchase these apples. Consequently, the union delivered to each store manager a letter specifically stating that the union would place pickets at the store "for the purpose of trying to persuade the public not to buy Washington Apples." The union informed the store managers that the pickets were instructed to patrol only in front of consumer entrances, not at delivery entrances, and were instructed not to interfere with the work of the store employees or with deliveries to the store. The store managers were also given a copy of the detailed written instructions provided by the union to the pickets, containing these and other restrictions. 377 U.S. 58, at 59-60, 74.

The union then commenced its consumer picketing with placards stating "To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington." In addition, the union pickets passed out handbills which read in part "This is not a strike against any store or market." *Id.* at 61 n.3.

On the basis of these facts, the Court held that the legislative history of Section 8(b)(4)(ii)(B) "[did] not reflect with the requisite clarity a congressional plan to *proscribe all* peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing *when it is limited, as here,* to persuading Safeway customers not to buy Washington State apples when they are traded in the Safeway stores." *Id.* at 63 (emphasis added). The Court contrasted the facts of that case with the use of picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." *Id.* The Court went on to note that in the case of peaceful picketing directed only at the struck product;

> the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.

Id. at 63-64 (footnote omitted). Finally, the Court concluded that the "consumer picketing carried on *in this case* is not attended by the abuses at which the statute was directed." *Id.* at 64 (emphasis added).

Because the facts of the present case are "poles apart" (*see Id.* at 70) from those in *Tree Fruits,* a different result is called for here. The following crucial differences from *Tree Fruits* should be noted:

1. The signs utilized by the Union's pickets were in no sense "consumer boycott" signs. Rather, they were traditional "primary" picket signs, akin to "Do Not Patronize" signs.[7]

2. The handbills passed out by the Union in the present case did not even mention the putative "struck product"—title insurance issued under Safeco Title's name. Rather, the handbills referred only to other "Safeco Group Companies" which, so far as the record is concerned, are unrelated to Safeco Title and the Land Title Companies.

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[7] Safeco Title argued to the Board that the language of the signs themselves made the picketing improper (Pet. App. C, p. 53a). The Board, however, found it unnecessary to pass on this argument (Pet. App. C, 59a n.16). The court of appeals left the question to be resolved by the Board on remand (Pet. App. A, pp. 5a-6a n. 13).

3. The Land Title Companies did not simply purchase a "struck product" from Safeco Title and then offer to resell it to the public, as was the case in *Tree Fruits*. Rather, Safeco Title was merely an underwriter and insurer of risks determined by the Land Title Companies. All of the work involved in issuing the title insurance policies (maintaining all of the real estate records for the particular county, accepting orders for title commitments, researching the real estate records, making decisions as to title commitments, preparing the title reports, etc.) was performed by the Land Title Companies—not Safeco Title.[8]

4. The Union's picketing, if successful, would result in virtually a complete boycott of the Land Title Companies.

Because of these crucial factual differences, *Tree Fruits* does not apply.

The distinction established in *Tree Fruits* between primary and secondary activity (*i.e.*, between following the struck product and persuading customers not to trade at all with the

[8] In view of these facts, Safeco Title argued before the Board (Pet. App. C, p. 53a) that this case was controlled by the "merged product" doctrine, exemplified by the following cases: *K & K Construction Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979); *Hoffman v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *NLRB v. Twin City Carpenters District Council*, 422 F.2d 309 (8th Cir. 1970); *American Bread Co. v. NLRB*, *411 F.2d 147 (6th Cir. 1969)*; and *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968). The court of appeals, believing that the Board had not based its decision on the merged product cases, refused to rule on this argument, leaving that question (as it did the question of the language of the picket signs themselves) to the Board for consideration on remand (Pet. App. A, pp. 27a-28a n.84). Since Safeco Title did not petition for review of this question, the issue is not presently before the Court. However, as the Board points out in its brief to the Court here, these cases support its decision. *See also* Note, 54 J. Urb. L. 579, 587-88 (1977); Comment, 30 Rutgers L. Rev. 176, 190 (1976).

secondary employer[9]) is applicable only in a relatively narrow factual setting. Where, as in *Tree Fruits*, the union confines its appeal to a particular struck product which represents a discrete but insignificant portion of the neutral retailer's product line, the union's activity can be readily distinguished as primary under the *Tree Fruits* test.

In the present case, however, the distinction disappears and one of the two competing interests plainly must yield. In similar cases where such a conflict has occurred, the paramount right of the neutral employer has been upheld. *See, e.g., American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969) (the primary's product has been integrated into the neutral's product); and *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968) (the primary's product or service is used for the general benefit of the neutral's business).

> [W]here picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer . . . by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection.

Honolulu Typographical Local 37 v. NLRB, 401 F.2d 952, 956 (D.C. Cir. 1968).

[9] The Court stated in *Tree Fruits* that:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firm are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. 377 U.S. at 72. (Footnote omitted).

In these situations, because so much of the neutral employer's business is targeted by the picketing, the union, while technically confining its appeal to the primary product, is for all practical purposes seeking a generalized loss of patronage, a result which *Tree Fruits* dictates is unacceptable:

> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product.

377 U.S. at 70.

> Asking the public to totally boycott a neutral, is tantamount to a demand that he cease dealing with the primary object of the Union's grievance. It is just such activity which the Act prohibits.

Hoffman v. Cement Masons Local 337, 468 F.2d 1187, 1191 (9th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973) (citation omitted).

In the present case, as both the Board and the dissenters to the *en banc* opinion observed, the foreseeable consequences of the Union's picketing converted an appeal purportedly directed solely at the struck product into a prohibited call for a full boycott of the Land Title Companies (Pet. App. A, p. 40a; Pet. App. C, p. 59a). Such a result is precisely one of the "isolated evils" which Congress intended to eliminate by the language of Section 8(b)(4)(ii)(B).

The coercion from which the 1959 amendments were designed[10] to protect secondary employers is clearly present in the instant case given the fact that successful consumer picketing would cut off 90-95% of the Land Title Companies' business. Thus, to apply *Tree Fruits* to the utterly different facts

[10] The relevant legislative history is reproduced in the Appendix hereto, pp. 1a-23a.

of this case would so far stretch the Court's reasoning as to destroy the protection provided by Section 8(b)(4)(ii)(B) to the neutral Land Title Companies.

The Union will likely argue that not extending *Tree Fruits* to the present case would "stand the statute on its head" by permitting secondary consumer picketing only when it is ineffective (*i.e.,* when the product represents only an insubstantial portion of the neutral's business), but prohibiting it when it is effective (*i.e.,* when the product represents a substantial portion). This argument ignores the fact that the secondary boycott protections were adopted to prevent a union from coercing a neutral employer to become involved in labor disputes of others. 377 U.S. at 63.

In *Tree Fruits,* it was extremely unlikely that the picketing of Washington State apples would cause Safeway to become involved in the dispute between the Teamsters and the fruit packers. However, in the present case, since the boycott involves virtually all of the business of the Land Title Companies, it is far more likely that they would be forced by the picketing to become involved in the labor dispute by putting pressure on Safeco Title to settle the dispute.[11] It was this broadening of the sphere of the dispute that Congress sought to avoid. In short, limiting *Tree Fruits* to the facts of that case does no violence to the statutory scheme.

II. The *Tree Fruits* Exception Should Be Reconsidered Since Experience Has Shown That It Is Impossible To Apply In Other Factual Settings And That It Has Resulted In Destroying The Protection Of Neutrals Envisaged By Congress.

If the *Tree Fruits* ruling is not confined to its facts, the balance struck by Congress in Section 8(b)(4)(ii)(B) would be gravely upset. When taken to its extreme as the court of appeals did in the present case, *Tree Fruits* results in legalizing

[11] *See* Comment, 30 Rutgers L. Rev. 176, 189 (1976).

union activity clearly prohibited by Congress in Section 8(b)(4)(ii)(B).[12] Because of this, we respectfully suggest that *Tree Fruits* be reconsidered.

A. *Congress Intended to Ban All Secondary Consumer Picketing.*

The relevant portions of the legislative history of the 1959 Landrum-Griffin amendments to the National Labor Relations Act are set forth in the Appendix hereto, pages 1a to 23a. We submit that if anything is clear from the legislative history, it is that Congress intended to prohibit all secondary picketing.[13] The distinction drawn in *Tree Fruits* between limited consumer product picketing and generalized consumer boycott picketing is inconsistent with the congressional intent.

B. Tree Fruits *Does Not Provide a Workable Standard for Distinguishing Between Primary and Secondary Activity.*

Experience has shown that it is extremely difficult to apply the *Tree Fruits* distinction in the real world of labor disputes. Outside of the paradigm case itself, *Tree Fruits* does not provide a satisfactory standard for conduct. For instance, where the secondary employer sells almost exclusively the product of the primary (as in *Dow Chemical*), or where the secondary resells the primary's product after it has been integrated into another product (as in *American Bread Co. v. NLRB,* 411 F.2d 147 (6th Cir. 1969)), or uses the primary's product or service for the general benefit of its business (as in *Honolulu Typographical Local 37 v. NLRB,* 401 F.2d 952 (D.C. Cir. 1968)), the *Tree Fruits* distinction breaks down.

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[12] *See* Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits,* 44 Tulane L. Rev. 537, 556 (1970).

[13] See the commentaries cited *supra,* Note 6.

The difficulty in applying the distinction to situations similar to the present case has been recognized by others,[14] but not yet considered by the Court. This difficulty is apparent in the present case as it was in *Dow Chemical.* The struggle by the Board and the court of appeals in trying to make the dictates of *Tree Fruits* conform to the facts of the instant case eloquently demonstrates the futility of attempting to use this distinction. It is simply unrealistic to maintain that the picketing in the present case did not have the objective of inducing the Land Title Companies to cease doing business with Safeco Title. Even if the picketing did not "coerce" customers, its overall effect was to "coerce" the Land Title Companies in violation of Section 8(b)(4)(ii)(B). The failure of *Tree Fruits* to provide a workable standard of conduct suggests that the doctrine should be reconsidered.

C. *Secondary Consumer Picketing Inevitably Calls for a General Boycott of the Neutral.*

The distinction in *Tree Fruits,* between limited consumer product picketing and picketing which appeals for a general consumer boycott of the neutral employer, is an abstract distinction which does not recognize the realities of union picketing.[15]

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[14] *See, e.g.,* R. Dereshinsky, The NLRB and Secondary Boycotts 73, 89-95 (Labor Relations and Public Policy Series Report No. 4, 1972); Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits,* 44 Tulane L. Rev. 537 (1970); Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?,* 63 Mich. L. Rev. 682 (1965). Even those commentators who believe *Tree Fruits* was correctly decided have noted the difficulties in applying the decision to other situations. *See, e.g.,* Engel, *Secondary Consumer Picketing—Following the Struck Product,* 52 Va. L. Rev. 189 (1966).

[15] *See* Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits,* 49 Minn. L. Rev. 479, 486 (1965); Note, 12 U.C.L.A. L. Rev. 238, 245 (1964).

To suggest that limited "struck product" picketing is not coercive because it is, at the same time, an invitation to the public to cross the picket line and purchase other products from the neutral is a contradiction in terms.[16] As has long been recognized, a union picket line, without regard to the language of the picket signs, is an overt call not to cross the picket line.[17] That call is far louder than the niceties of the particular words on a placard.

The reality is that a union picket line simply cannot be limited to a stated purpose of only encouraging consumers not to purchase a particular product. The picket line itself requests a refusal to do business with the neutral. Here, as in other situations, actions speak louder than words.

The courts have long recognized this "signal aspect" of picketing.[18] In *Hughes v. Superior Court,* 339 U.S. 460, 465 (1950), the Court noted:

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of

[16] *See* Lewis, *supra* note 15, 49 Minn. L. Rev. at 492.

[17] Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits,* 44 Tulane L. Rev. 537, 538 n. (1970); Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?,* 63 Mich. L. Rev. 682, 691-92 (1965); Note, 12 U.C.L.A. L. Rev. 238, 245 (1964).

[18] The term "signal aspect" as used in this brief denotes a more general phenomenon than that, as described by Professor Cox in *Strikes, Picketing & the Constitution,* 4 Vand. L. Rev. 574, 595-96 n. 5 (1951), limited to an appeal for support directed to other union members. Instead, the term as used in this brief refers to the reaction by both other union members and the public when encountering a picket line, regardless of the language on the placards. The Court has recognized the effect of the "signal aspect" of picketing on consumers as well as employees. *Hughes v. Superior Court,* 339 U.S. 460, 465 (1950).

> communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

See also Local 10, Plumbers and Pipefitters v. Graham, 345 U.S. 192 (1953); *International Brotherhood of Teamsters Local 309 v. Hanke,* 339 U.S. 470 (1950).

Mr. Justice Douglas, in his concurring opinion in *Bakery Drivers Local 802 v. Wohl,* 315 U.S. 769 (1942), pointed out that a picket line "may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 315 U.S. at 776. The Court has similarly held in *Building Service Employees Local 262 v. Gazzam:* " [Picketing] is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey . . . ." 339 U.S. 532, 537 (1950).

Because of what the Court has termed the "compulsive features inherent in picketing," *Hughes v. Superior Court,* 339 U.S. 460, 468 (1950), the effect on those confronting a picket line will be the same regardless of the message on the placards: they will hesitate to cross the picket line. Even if the "signal aspect" of a picket line does not affect the conduct of those confronting it, the actual message conveyed by the physical presence of the pickets will be far different than the written message on the placards. As the Court of Appeals for the Fifth Circuit pointed out:

> A picket line . . . has a special message of its own. To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of "unfairness" on those engaged in activity behind the picket line.

Superior Derrick Corp. v. NLRB, 273 F.2d 891, 896 (5th Cir. 1960). The Court of Appeals for the Third Circuit in *K&K Construction Co. v. NLRB,* 592 F.2d 1228, 1234 n.6 (3d Cir. 1979), similarly noted:

> Traditionally, the public associates picketing with a labor dispute . . . . Thus picketing, because it instantly signals a labor dispute, is likely to signal the public that the employer being picketed is unfair to labor.

This "signal aspect" results not only in an inherently *misleading* message being communicated to consumers to the detriment of the innocent neutral, but conveyance of an *inconsistent* message as well. Congress adamantly refused to allow consumer picketing because the traditional message associated with a union picket line is "Do not cross." Allowing the conveyance of this broad message by the physical presence of a picket line, while expecting the consumer to act only on the basis of the "truthful" legends on the placards, ignores reality. The Court of Appeals for the Tenth Circuit pointed out this inconsistency when it stated:

> Generally, the very existence of a picket line is an appeal to the public and to other employees not to enter the picketed premises, notwithstanding printed declarations that the primary dispute is with another party who is not present.

NLRB v. Building Service Employees Local 105, 367 F.2d 227, 229 (10th Cir. 1966) (citations omitted). *See also NLRB v. Local 307, Plumbers,* 469 F.2d 403 (7th Cir. 1972); *NLRB v. Dallas General Drivers Local 745,* 264 F.2d 642 (5th Cir. 1959).

As the Fifth Circuit pointed out in *Burr v. NLRB:*

> [The union's theory] seems to assume that while a consumer picketing urging a *complete* boycott would be prohibited, this consequence does not attach if the plea is confined merely to the products of the primary employer. This is fallacious on at least two grounds. Perhaps the foremost is the damaging effect of any picket line posted in front of any retail establishment in the contemporary world of the highly developed organized trade unionist movement. [Footnote omitted.] Even more directly, a plea not to buy a particular product is in effect a plea not to trade with the secondary employer at all.

321 F.2d 612, 619-20 (1963) (emphasis in original).

Mr. Justice Harlan in his dissent in *Tree Fruits* recognized this fact:

> Because of the very nature of picketing there may be numbers of persons who will refuse to buy at all from a picketed store, either out of economic or social conviction or because they prefer to shop where they need not brave a picket line. Moreover, the public can hardly be expected always to know or ascertain the precise scope of a particular picketing operation. Thus in cases like this, the effect on the secondary employer may not always be limited to a decrease in his sales of the struck product.

377 U.S. at 82-83.

The "signal aspect" of secondary consumer picketing is especially significant since an unlawful purpose under Section 8(b)(4)(B) is imputed from the objective indicia surrounding the picketing, not the subjective intent of the picketing parties. *See Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949). The inevitable result is that secondary consumer picketing, no matter what the written message is, violates Section 8(b)(4)(ii)(B) because of necessity it conveys a message asking for a total consumer boycott of the neutral employer.

In summary, (1) Congress intended to ban all secondary picketing; (2) experience establishes that the consumer product picketing doctrine is unworkable; and (3) union picketing necessarily calls for a general boycott. In view of these facts, it is appropriate for the Court to reconsider *Tree Fruits,* and hold that 8(b)(4)(ii)(B) prohibits all secondary consumer picketing.

III. Section 8(b)(4)(ii)(B), Prohibiting Secondary Consumer Picketing, Is A Constitutional Exercise Of Congressional Power.

The Union will doubtless argue that the Congressional ban of all secondary picketing, including consumer picketing, viol-

ates its First amendment rights.[19] The Court should consider, *see NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22 (1963); *International Association of Machinists v. Street,* 367 U.S. 740 (1961), and reject that argument.

The decision by Congress to prohibit all secondary picketing is not constitutionally infirm since the substantive evils of this picketing—enlargement of the labor dispute and disruption of an innocent neutral's business—outweigh whatever First Amendment protection secondary consumer picketing may have, particularly since other and more effective means of communication are preserved. The Court has held that when Congressional protection of a "weighty interest" has a limited effect on First Amendment freedoms, such regulation is permissible. *See Buckley v. Valeo,* 424 U.S. 1, 29 (1976). On numerous occasions, state and federal regulation of picketing has been upheld.[20]

The paramount importance of protecting the rights of the neutral was consistently emphasized throughout the legislative debate on the Act. The Court, in turn, has recognized the Congressional objective "of shielding unoffending employers

[19] The First Amendment to the Constitution reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[20] The Court has held the following rights to outweigh picketing's First Amendment value: a city's right to regulate traffic, *Cox v. Louisiana,* 379 U.S. 536 (1965); the private property right, *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972); the right of free choice by an employer, *Carpenters & Joiners Local 231 v. Ritter's Cafe,* 315 U.S. 722 (1942); contract rights, *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949); the state's right to regulate illegal conduct, *Hughes v. Superior Court,* 339 U.S. 460 (1950). Indeed, when confronted with traditional property rights, union picketing has no First Amendment protection at all. *Hudgens v. NLRB,* 424 U.S. 507 (1976).

and others from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 692 (1951); *see also NLRB v. Local 825, International Union of Operating Engineers,* 400 U.S. 297, 302 (1971); *IBEW Local 501 v. NLRB,* 341 U.S. 694, 705 (1951). As a result, "prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) [now 8(b)(4)(B)] carries no unconstitutional abridgment of free speech." *IBEW Local 501 v. NLRB,* 341 U.S. 694, 705 (1951); *see also Carpenters & Joiners Local 231 v. Ritter's Cafe,* 315 U.S. 722, 726 (1942).

Congressional enactment of the "publicity proviso"[21] which granted protection to all forms of consumer communication except picketing, clearly eliminated any First Amendment grounds to attack the Act. *Tree Fruits* raised but did not resolve the question of whether Congress could, consistent with the First Amendment, differentiate between picketing and all other forms of communication under the "publicity proviso." Examination of the First Amendment decisions by this Court and the lower federal courts reveals that this differentiation is valid because of the unique characteristics of secondary picketing: (1) it is largely comprised of coercive conduct; and (2) the little communicative value attributable to such picketing is completely undermined by its inherent "signal aspect." As a result of these characteristics, the "isolated evils" which accompany secondary picketing (and which Congress sought to regulate) are absent where other avenues of communication are utilized.

[21] "*Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . ."

A. *Secondary Picketing Has No First Amendment Protection Because It Is Largely Conduct and Because Its "Signal Aspects" Undermine Its Communicative Value.*

The Court has consistently distinguished picketing from pure speech because of picketing's "conduct" element. Mr. Justice Douglas, in his concurring opinion in *Bakery Drivers Local 802 v. Wohl,* pointed to the "speech plus" aspect of picketing as justifying regulation: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality . . ." 315 U.S. 769, 776-77 (1942); *see also Carpenters & Joiners Union Local 231 v. Ritter's Cafe,* 315 U.S. 722, 726 (1942). In a later opinion the Court stated unequivocally that picketing "cannot dogmatically be equated with the constitutionally protected freedom of speech." *International Brotherhood of Teamsters Local 309 v. Hanke,* 339 U.S. 470, 474 (1950); *see also Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 501 (1949). As a result of the "compulsive feature inherent in picketing", it has a character beyond "mere communication as an appeal to reason. . . ." *Hughes v. Superior Court,* 339 U.S. 460, 468 (1950).[22]

The courts not only have differentiated picketing from pure speech, but have also treated picketing differently than handbilling, which also involves conduct. Handbilling, entitled to First Amendment protection (*see Organization for a Better*

[22] On numerous occasions since *Hughes,* the Court has reaffirmed the distinction between picketing and pure speech. *See Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973); *California v. La Rue,* 409 U.S. 109, 117 (1972); *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 313 (1968); *United States v. O'Brien,* 391 U.S. 367, 376 (1968); *Cox v. Louisiana,* 379 U.S. 536, 555-56 (1965); *International Brotherhood of Teamsters Local 695 v. VOGT, Inc.,* 354 U.S. 284, *rehearing denied,* 354 U.S. 945 (1957).

Austin v. Keefe, 402 U.S. 415 (1971)), in some situations has

been allowed to take place in spite of restrictions on picketing. For instance, the Court of Appeals for the Second Circuit held that the right to distribute handbills and talk to applicants in a welfare office constituted protected "pure speech", while picketing in the same area would not have been permissible. *Albany Welfare Rights Organization v. Wyman,* 493 F.2d 1319, 1324 (2d Cir. 1974).[23]

The lessened degree of First Amendment protection for picketing is attributable both to picketing's "signal aspect" and the more intrusive characteristics of picket lines.

The "signal aspect" of picketing is discussed in detail, *supra* pp. 7-21. The message conveyed by the physical presence of pickets—"Do Not Patronize"—is far stronger than the contradictory written placards. Because of this "signal aspect", the Court has recognized that communication by "publication in a newspaper, or by distribution of circulars," results in a more effective conveyance of a message. *Hughes v. Superior Court,* 339 U.S. 460, 466 (1950). The Court thus drew the picketing/nonpicketing distinction several years prior to Congress' decision to draw the same distinction in the Act's publicity proviso. The Court of Appeals for the Third Circuit also drew this distinction in *K&K Construction Co. v. NLRB,* 592 F.2d 1228, 1234 n.6 (1979):

> Handbilling and other forms of publicity, on the other hand, are not likely to have the signal aspect of labeling the neutral as unfair. . . . Moreover, handbilling and other informational devices are better adapted at truthfully advising the public. [Citation omitted.]

Congressional differentiation between picketing and other forms of communication therefore is a rationally-based and constitutionally-sound decision. Section 8(b)(4)(ii)(B), banning all secondary picketing, is purely *conduct* and not *content* oriented.

[23] The Court in *Tree Fruits* implicitly recognized the greater First Amendment protection accorded handbilling since "publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him . . ." (377 U.S. at 70) was permitted, while picketing seeking the same result was prohibited.

The Congressional regulation cannot be attacked as an infringement of "commercial speech", as the Union argued below. First, the Union cannot show that secondary consumer picketing merely proposes a commercial transaction and nothing more. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973). Second, the Union cannot persuasively argue that the consumer's right to receive information would be hampered, especially when alternative and more effective avenues of communication are present. Third, regulation of the type of misleading message which results from secondary picketing is proper. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 383, *reh. denied,* 434 U.S. 881 (1977). Finally, as the Court has repeatedly stated, picketing is far different from pure speech, and can be regulated or even banned if another protected interest is strong enough.

B. ***Any Alleged Infringement of the Communicative Aspects of Secondary Consumer Picketing Is Alleviated by the Presence of Effective Alternative Means of Communication to Consumers.***

The availability of alternative means of communication, other than the regulated means, is a factor considered by the Court in balancing the First Amendment rights of unions against the rights of neutral employers to be free from the economic hardship of secondary boycotts. *See Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972); *Local 761, International Union of Electrical Workers v. NLRB,* 366 U.S. 667, 672 (1961).[24] The Court has held that the presence of alternative means of communication may sanction governmental regulation of speech:

> [W]e regard the available "alternative means of (communication as) a relevant factor" in a case such as this where

[24] *See* Note, 54 J. Urb. L. 579, 596 (1977).

> "we (are) called upon to balance First Amendment rights against (legitimate) governmental . . . interests." *Kleindienst v. Mandel,* 408 U.S. 753, 765 (1972).

Pell v. Procunier, 417 U.S. 817, 824 (1974). *See also Lloyd Corp. v. Tanner,* 407 U.S. 551, 567 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

The "publicity proviso" of the Landrum-Griffin Act expressly provides that all methods of communication other than picketing are available truthfully to advise the public that the union has a dispute with the producer of a particular product carried by the neutral business. These alternative means of conveying factual information to consumers have been recognized as far more effective, more believable, and less volatile than picketing.

Mr. Justice Harlan, in his dissent in *Tree Fruits,* looked to this factor as one which had a substantial effect on the constitutionality of the picketing ban:

> The decision of Congress to prohibit secondary consumer picketing during labor disputes is, I believe, not inconsistent with the protections of the First Amendment, particularly when, as here, other methods of communication are left open.

377 U.S. at 93.

The Union may argue that it has the right to utilize the "most effective means" available to publicize its dispute. We submit that the Union's desire to use the "most effective means" is not a First Amendment claim. Rather, it is an admission that picketing can accomplish something more than could be accomplished by pure speech alone—*i.e.,* a boycott of the neutral without regard to the stated message. For this very reason 8(b)(4)(ii)(B) was enacted and should be enforced here.

C. *In View of the Substantial Support for Congress' Determination that Picketing Differs from Other Methods of Communication, the Court Should Defer to Congress' Judgment.*

Congressional determinations in the area of constitutional rights, when these rights are affected by the Commerce Clause, are entitled to judicial deference, particularly where, as here, Congress has a rational basis for such determination. *Katzenbach v. Morgan,* 384 U.S. 641, 653 (1966); *Katzenbach v. McClung,* 379 U.S. 294, 300 (1964). In view of the fact that the Act is narrowly drawn to preserve effective First Amendment communications which lack the evils of secondary picketing, this historical deference should obtain in the area of secondary picketing. *Cf. United States v. Rabel,* 389 U.S. 258, 268 (1967).

As Mr. Justice Harlan stated in his dissent in *Tree Fruits:*

> Congress has given careful and continued consideration to the problems of labor-management relations, and its attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated, are entitled to great deference.

377 U.S. at 93.

The Landrum-Griffin Act does not place a sweeping, inexact ban on picketing, but rather proscribes only picketing calculated to have effects apart from the ideas expressed. The Congressional judgment that the effects of secondary consumer picketing are undesirable provides the basis for the limitation. The Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech..." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 (1973) (emphasis in original).

Merely because the Congressional regulation reaches consumer picketing as well as employee-directed picketing does not deprive it of constitutionality:

> Congress regarded the pressuring of a secondary *employer* as much an evil as efforts to induce or encourage his employees to strike or not handle goods. The aim of the law is to free interstate commerce from the disruptive consequences of labor strife. In the legislative judgment, to 'signal' *persons* into a sympathetic refusal to handle goods is no more obstructive than to bring about the same ultimate objective . . . through coercive pressures on the secondary employer. . . . When the purpose of the conduct is the same, it is for Congress to determine that similar restraints may be imposed.

Burr v. NLRB, 321 F.2d 612, 622 (5th Cir. 1963) (emphasis in original).

Just as the statutory prohibitions of general secondary picketing and recognitional picketing are constitutional, *IBEW Local 501 v. NRLB,* 341 U.S. 694 (1951); *International Brotherhood of Teamsters Local 344 v. NLRB,* 568 F.2d 12 (7th Cir. 1977), so too is the prohibition of secondary consumer picketing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Legislative History of 8(b)(4) Application to Secondary Consumer Picketing

The Labor-Management Reporting and Disclosure Act[25] was the product of compromise between the Senate's Kennedy-Ervin bill[26] and the House of Representatives' Landrum-Griffin bill.[27]

The Landrum-Griffin bill proposed legislation regulating internal union affairs and contained amendments to the National Labor Relations Act[28] designed to close certain "loopholes" in Section 8(b)(4) of the NLRA. One of the often-cited loopholes was the failure of Section 8(b)(4) to effectively prohibit direct pressures against a secondary employer with the object of forcing it to cease doing business with the primary employer. The Administration Bill, introduced in the Senate by Senators Goldwater and Dirksen, closely paralleled the Landrum-Griffin bill.[29]

The Landrum-Griffin bill proposed amending Section 8(b)(4) of the NLRA to read, in part, as follows:

> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:
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> . . .
>
> (B) forcing or requiring any person to cease, or to agree to cease, using, selling, handling, transporting, or otherwise

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[25] Pub. L. No. 86-257 73 Stat. 519 (1959).
[26] S.1555, 86th Cong., 1st Sess. (1959).
[27] H.R. 8342, as amended, 86 Cong., 1st Sess. (1959).
[28] National Act), 49 Stat. 449 (1935), as amended by the Labor-Management Relations Act (1947).
[29] S.748, 86th Cong., 1st Sess. (1959).

> dealing in the products of any other producer, processor, or manufacturer, or to cease, or agree to cease, doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; . . .

Initially, the types of threats and coercion of secondary employers intended to be covered were not explained in detail by the sponsors of the legislation. On July 27, 1959, Congressman Griffin explained a portion of his bill:

> This section deals effectively with two of the most flagrant types of conduct engaged in to thwart the basic policy of the National Labor Relations Act—secondary boycotts and recognition or organizational picketing. One of the major defects in the Senate and committee bills is the fact that while they concede there is a problem, they deal with these abuses in such an ineffective manner that it can truly be said they do not deal with the basic evils at all. . . .
>
> It is clear from the legislative history of the Taft-Hartley Act that Congress meant to outlaw all secondary boycotts. Unfortunately, various judicial and administrative decisions have held that the present language of Section 8(b)(4) and Section 303 permit labor organizations to engage in some types of secondary boycotts with complete impunity. This has been one of the major weapons, as numerous hearings have disclosed, used by gangsters and racketeers who infiltrated the labor movement.

105 Daily Congressional Record 13091, July 27, 1959. *Reprinted in* 2 U.S. N.L.R.B. Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1522 (1959) (hereinafter cited as Leg. Hist.).

On August 11, 1959 Congressman Griffin explained further:

> In . . . many other cases, a secondary boycott was used. You might ask, How could it have been used if Congress intended to outlaw secondary boycotts? The answer is that over the past 12 years a few gaping loopholes have developed. Our substitute bill is designed only to close up these loopholes.

105 Daily Congressional Record 14195, August 11, 1959. 2 Leg. Hist. 1568.

The Kennedy-Ervin bill, on the other hand, focused almost exclusively on internal union reforms since its supporters were opposed to any Taft-Hartley amendments.[30] The bill introduced in the Senate contained no amendments to the secondary boycott provisions of the Act.

Senators Goldwater, McClellan and Dirksen each attempted to gain approval of efforts to amend the Act so as to "plug loopholes." Their efforts prompted Senator Humphrey to express his "fears" concerning Senator Goldwater's amendment to the Kennedy-Ervin bill:

> This proposed amendment . . . deals then with an activity which is already regulated and regulated plentifully.
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> . . .
>
> It is proposed now, however, that it be declared an unfair labor practice to threaten, coerce, or restrain any person to engage in a boycott.
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> . . .
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> [After a discussion of whether the amendment would reach leafletting of a neutral employer]

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[30] Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 258-59 (1959).

> To distribute leaflets at the premises of a neutral employer to persuade customers not to buy a struck product is one form of consumer appeal. To peacefully picket the customer entrances, with a placard asking that the struck product not be bought, is another form. I fear that consumer picketing may also be the target of the words "coerce, or restrain." I fear that, in addition to the existing foreclosure of the union on strike from making any effective appeal to the employees of the so-called neutral employer, the union by this amendment is now to be effectively sealed off from even an appeal to the consumers.

105 Daily Congressional Record 5579, April 17, 1959. 2 Leg. Hist. 1036.

On April 20, 1959, Senator McClellan discussed his proposed amendment to the Kennedy bill.[31] Senator McClellan stated:

> Then I propose to offer an amendment related to the secondary boycott, to strengthen the law so as to prevent any union official from saying to a customer of a manufacturer a thousand miles away from the scene of the dispute, "You can no longer handle the products of that manufacturer," and place a picket line around his establishment. It would prevent any union official from saying to such a businessman, "If you handle the products of a certain manufacturer, we will picket your place and shutoff your supplies, and embarrass customers who come here to deal with you."

105 Daily Congressional Record 5633, April 20, 1959. 2 Leg. Hist. 1052.

On April 21, 1959 Senator Goldwater commented on the Administration bill which was eventually defeated. Senator Goldwater stated:

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[31] Senator McClellan's amendment reflected his bill, S.1384, 86th Cong., 1st Sess. (1959).

> The administration bill has a broader purpose, namely, to curb the improper practices in the labor and management fields revealed by the Senate select committee . . .
>
> . . .
>
> The McClellan committee has heard a great deal of testimony as to how certain unions, particularly the Teamsters, have taken advantage of the inadequacies of the present secondary boycott provisions of the National Labor Relations Act to force employers to cease doing business with other employers of whom the union disapproves. Yet, S.1555 does nothing to correct these inadequacies.
>
> When the Taft Hartley Act was enacted in 1947, it was the intent of Congress to do away with secondary boycotts. Evidently Congress at that time overlooked some important fact situations leading to secondary boycotts—at least the Board and the courts consider that we did—and these have been seized upon by those intent upon circumventing the law to achieve objectives otherwise prohibited by the act.
>
> The biggest loophole in the present law is that it does not prohibit a union from using direct pressures upon an employer with the object of forcing him to cease using the products of, or to cease doing business with, another person.

105 Daily Congressional Record 5764, April 21, 1959. 2 Leg. Hist. 1079.

On April 24, 1959, Senator McClellan spoke in support of his amendment:

> Mr. President, we are all familiar with the problem known as secondary boycott. There have been some abuses in this field, and the amendment seeks to correct them.

Mr. President, I shall state what the amendment would prohibit which is not now prohibited, and how it would fill in the gaps in the Taft-Hartley law as it now operates. The amendment covers the direct coercion of secondary employers to cause them to cease dealing with or doing business with the primary employer. In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union could not use picketing to try to compel me to cease handling the products of the plant where the labor dispute is under way.

. . .

The amendment, Mr. President, covers pressure in the form of dissuading customers from dealing with secondary employers. That refers to establishing a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union. It is an effort to influence the original employer.

Mr. President, these cases come up repeatedly. There are those who believe that almost any power should be placed in and retained by unions to force their will, by the use of economic power and economic coercion, in almost any situation which may arise.

Mr. President, I have been pleading for this cause ever since the debate on the bill started. I have been trying to have adopted a measure to protect those who are innocent and helpless.

I point out that we have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand of product. A merchant may have built his business around the product, such as the John Deere plows or some kind of machinery from some

other company. The merchant may have built up his trade entirely on that product. The merchant may have a competitor who is handling a competitive product made by another manufacturer, which serves the same function, but which is a different brand and is manufactured by someone else. In one of these plants there may be a strike, and the union may picket the merchant who is handling the product of the struck plant. The union may say to the merchant, "You cannot sell this product. If you do we will picket your place of business. Thus you will not be able to get your supplies, because the Teamsters will not cross the picket line."

In addition, the merchant's customers would be embarrassed. They would be harassed. They would see the picket sign. What would the sign say? It would say "Unfair to labor." How is the merchant unfair to labor? It is simply a case of the merchant not being willing to stop handling a product which he has been handling for 20 years and on which he has built his business. That is a secondary boycott which, it seems to me, ought to be prohibited.

105 Congressional Record 5970-71, April 24, 1959. 2 Leg. Hist. 1193-94.

Proposals in the Senate to add amendments to the secondary boycott provisions were defeated.[32] The Kennedy-Ervin bill was approved by the Senate on April 25, 1959.[33]

In the House on August 11, 1959, Congressman Thompson of New Jersey and Congressman Udall of Arizona targeted

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[32] Senator McClellan's amendment was defeated. 2 Leg. Hist. 1198.

[33] The Senate did adopt a section dealing with the "hot cargo" situation.

some very specific criticisms towards the Landrum-Griffin bill. They inserted into the Congressional Record on analysis which stated, in part:

> Section 702 of the Landrum bill denies freedom of speech.
>
> The bill provides that a union may not restrain an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts, and newspaper advertisements, thereby interfering with freedom of speech.
>
> Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sold Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.
>
> The Landrum bill forbids this elementary freedom to appeal to the general public for assistance in winning fair labor standards. The union apparently could be enjoined upon the ground it was coercing or restraining the retailer with the object of inducing him not to deal with the brewery; indeed, as I understand it, one of the acknowledged purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute.
>
> This is a basic infringement on freedom of expression.

105 Daily Congressional Record 14203, August 11, 1959. 2 Leg. Hist. 1576.

It should be observed, however, that the dispute in the House of Representatives centered on whether to substitute the Landrum-Griffin bill for the bill reported by the Committee on

Education and Labor, H.R. 8342. Both proposals were understood to prohibit secondary boycott picketing. Congressman LaFare, a member of the House Committee on Education and Labor, explained the committee's bill on March 11, 1959 (eventually replaced by the Landrum-Griffin bill):

> Although (B) of my bill is different from (B) in the present Taft-Hartley Act, it is taken from the second clause of Taft-Hartley's subsection 8(b)(4)(A). It reads:
>
> > (B) causing or attempting to cause any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing busines with any other person.
>
> The new subsection (B), however, is more compact than the language of the present subsection (A). It also leaves no doubt that it is intended to protect secondary employers such as distributors, dealers, wholesalers, jobbers, and others from secondary boycott pressure.
>
> For example, let us assume that there is a labor dispute between a union and a maker of electrical fixtures. Unable to win its dispute fairly, the union enlists the cooperation of unions engaged in the construction industry. The construction unions advise contractors that they will be courting labor trouble if they continue to use electrical fixtures made by the manufacturer who is having a labor dispute with the electrical union. The construction unions point out to the contractors that they do not have to cease doing business with the jobber or distributor of the electrical fixtures, but merely require the distributor to order fixtures which are not made by the alleged "unfair" manufacturer.
>
> If the distributor handles only one line of fixtures, it means that the contractor is forced to stop doing business with the distributor—both of whom are completely neutral

and innocent in the primary labor dispute. Such a distributor faces bankruptcy if the union's coercion is great enough.

Where the distributor handles more than one line of fixtures, it might be contended that the coercion or threat is not designed to force the contractor to cease doing business with the distributor, but that he is merely being asked to provide one brand of a product instead of another.

My bill would make such activity a secondary boycott violation and an unfair labor practice.

105 Daily Congressional Record 3511, March 11, 1959. 2 Leg. Hist. 1471.

On the floor of the House on August 12, 1959, a particularly revealing exchange took place between Congressmen Brown and Griffin:

Mr. BROWN of Ohio. Mr. Chairman, I should like to propound a question either to Mr. Griffin or to Mr. Landrum, the authors of one of the bills, relative to secondary boycotts. If I understood their testimony before the Committee on Rules correctly, the authors of this bill stated their bill will deal properly with secondary boycotts.

My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

Mr. BROWN of Ohio. That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. GRIFFIN. Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN of Ohio. But the Griffin-Landrum bill would?

Mr. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. BROWN of Ohio. Not to sell the goods of some concern that is on strike. Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing...

Mr. BROWN of Ohio. Advertising.

Mr. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.

Mr. BROWN of Ohio. Would either of the other two bills cover it?

Mr. GRIFFIN. Absolutely not; they would make no change in the existing law on that point.

105 Daily Congressional Record 14339, August 12, 1959. 2 Leg. Hist. 1615.

The House approved the Landrum-Griffin bill on August 15, 1959.

On August 20, 1959 Congressman Thompson of New Jersey inserted into the Congressional Record an analysis (prepared by Senator Kennedy and Congressman Thompson) comparing the Landrum-Griffin bill with the Senate bill:

> The House bill provides that a union may not "restrain" or "coerce" an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
>
> Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sell Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

> The House bill outlaws such appeals to the general public for assistance in winning fair labor standards. The union apparently could be enjoined upon the ground that it was "coercing" or "restraining" the retailer with the object of inducing him not to deal with the brewery; indeed, one of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression. The portions of the House bill which have this effect are unacceptable.

105 Daily Congressional Record 15223, August 20, 1959. 2 Leg. Hist. 1708.

The House and Senate bills (respectively the Landrum-Griffin and Kennedy-Ervin bills) were sent to a conference committee for compromise of the differences. Prior to House passage of Landrum-Griffin, President Eisenhower delivered a radio speech to rally support for Taft-Hartley amendments. On August 6, 1959 he stated:

> You know, a great deal is being said and written about this subject. We hear one bill called a "weak" bill, another, a "strong" bill, and so on. The American people are not interested in adjectives, or in labels. They are interested in a law which will eliminate the abuses.
>
> I want only effective protection from gangsters and crooks for the people of America—for the men and women who labor with their hands, their minds, their energies, to make America a better place for themselves and for their children.
>
> . . .
>
> To date, legislation to correct these deplorable conditions has not been enacted. Meanwhile the evidence of abuses has continued to mount before Congressional committees.

Chief among the abuses from which Americans need protection are the oppressive practices of coercion.

. . .

[Eisenhower then discussed "blackmail" recognitional picketing.]

Take another company—let us say a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself unscrupulous organizing official in this case use another scheme. They picket the stores which sell the furniture this plant manufactures. The purpose is to prevent those stores from handling that furniture.

How can anyone justify this kind of pressure against stores which are not involved in any dispute? They are innocent bystanders. This kind of action is designed to make the stores bring pressure on the furniture plant and its employees—to force those employees into a union they do not want. This is an example of a "secondary boycott."

I want that sort of thing stopped, so does America.

The blackmail picket line and the secondary boycott cannot possibly help the working men and women of America.

. . .

The bill which passed the Senate in April is not effective. It does not deal with or curb the picketing or boycotting practices I have described.

. . .

In the House of Representatives the Labor Committee bill is even less effective than the Senate bill. It, too, fails to deal with picketing and boycotting practices I have described.

. . .

Neither the Senate bill nor the House committee bill will really curb the abuses the American people want to see corrected.

However, Congress need not limit itself to such a choice.

The Administration bill is still before the Congress. There is also before the House a bipartisan bill jointly sponsored by two members of the House Labor Committee—Mr. Landrum of Georgia, a Democrat, and Mr. Griffin of Michigan, a Republican. The Landrum-Griffin bill is a good start toward a real labor reform bill, containing many of the corrective provisions I have urged.

New York Times, August 7, 1959. 2 Leg. Hist. 1842-43.

The President's speech placed considerable pressure on the Senate conferees to accept the House position on the Taft-Hartley amendments.[34] During the conference committee's deliberations, Senator Kennedy returned to the Senate for instructions for the Senate conferees. Until this time, Landrum-Griffin had not contained a publicity proviso. Senator Kennedy proposed that the Senate offer the following proviso as its position:

> *Provided,* That nothing contained in this subsection (b) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operating, or goods are produced or distributed, by an employer engaged in a labor dispute, without inducing employees to refuse to pick up, deliver or transport any goods, or perform any services in such establishment. . .

A colloquy between Senators Kennedy and Dirksen sheds some light on the genesis of the proviso:

> Mr. DIRKSEN. I do not expect to discuss here very many of the provisions which are not in the Landrum-

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[34] Cox, *supra* Note 30, 44 Minn. L. Rev. at 260.

Griffin bill or in the Senate bill. Some of these provisions are not in either, as I recall. But here is my difficulty: We got into a tizzy in the illustration used about a mattress plant located, let us say, in Raleigh, N.C., which has a very good customer in St. Louis, Mo. They have a labor dispute in Raleigh, and the pickets show up at the customer's plant in St. Louis. We spend a day discussing what shall appear on the signs. Can they put something in the newspapers? Can they go on the radio?

Mr. KENNEDY. We agreed to that. It is not a part of our resolution.

Mr. DIRKSEN. It is a question of customer picketing.

Mr. KENNEDY. That is right. In that case, we have receded on the question of consumer picketing of a secondary employer.

Now we are going quite far in limiting the right of unions, the traditional right to carry on picketing. And I will say to the Senator that on that point which he raises we have already agreed to the House position.

105 Daily Congressional Record 15901, August 28, 1959. 2 Leg. Hist. 1378.

The present language in 8(b)(4) was the compromise product of the conference committee:

> (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is
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> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .
>
> . . .

> Provided further, That for the purposes of this paragrapn (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . .

H.R. Rep. No. 1147, 86th Cong. 1st Sess. 38 1 Leg. Hist. 942.

Senator Kennedy reported, September 2, 1959, on the final outcome of the conference committee. Speaking to the changes made in the Landrum-Griffin bill, he stated:

> Secondly, the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.
>
> We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.
>
> Under language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

105 Daily Congressional Record 16254-55, September 2, 1959. 2 Leg. Hist. 1388-89.

Senator Morse was quite disappointed with the compromise bill. In a long speech expressing his remaining disagreements, he noted the following with respect to consumer picketing:

> This bill does not stop with threats and illegalizing the hot cargo agreement. It also makes it illegal for a union to "coerce, or restrain." This prohibits consumer picketing.

What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, "Do not buy X shoes." This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer.

. . .

We take a long and backward step when we illegalize consumer picketing. It is not enough to say that the union can make its appeal by newspaper advertisements and leaflet distribution. Advertisements are expensive, and both may be ineffective to quickly and dramatically catch the public's eye. Picketing is usually the only effective way of reaching the consumer at the only place where it matters—where the product is sold and at the time that the customer is interested in buying it. When we prohibit consumer picketing we compel the public, through ignorance of the situation, to side with the employer rather than the union. We prevent the consumer from making his own choice.

How retrogressive this bill is can be seen from the fact that even publicity other than picketing—leaflets and advertisements—is curbed. For the bill permits "publicity, other than picketing, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer" not to work at the place where the product is sold. Two things should be observed about this limitation. First of all, by excepting picketing, it acts on the assumption that consumer picketing inevitably and always causes employees not to work as well as customers not to buy. This is a false assumption, and experience has demonstrated its falsity.

. . .

Secondly, whatever the effect of publicity other than picketing, we are quite without constitutional power to prohibit free speech because of that effect. [Morse then quoted from *Thornhill v. Alabama*].

. . .

Certainly picketing in many instances is very effective. That is why antilabor employers wish to get rid of it. Certainly, Mr. President, public knowledge of labor practices on the part of an employer, as disclosed by picket signs, sometimes proves to be very embarrassing to the employer, particularly when the public proceeds to investigate and discover what the facts are.

105 Daily Congressional Record 16397, September 3, 1959. 2 Leg. Hist. 1426-27.

On September 3, 1959, Senator Kennedy, during Senate debate on the conference report, noted the following:

Third. Secondary boycotts: The chief effect of the conference agreement, therefore, will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about the desirability of plugging these artificial loopholes. The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the Senate conferees insisted that the report secure the following rights:

. . .

(c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling

goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 Daily Congressional Record 16413-14, September 3, 1959. 2 Leg. Hist. 1431-32.

The Senate approved the conference report on September 3, 1959. 105 Daily Congressional Record 16435. 2 Leg. Hist. 1453.

During consideration in the House, Congressman Thompson of New Jersey listed fifteen of the "most important improvements" made by the conferees to the House's Landrum-Griffin bill:

> 2. Consumer appeals: The right to publicize nonunion goods to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for consumer boycott would have been barred by House bill.

105 Daily Congressional Record 16635, September 4, 1959. 2 Leg. Hist. 1720. Following this, Congressman Thompson summarized in some detail "eight major points":

> 3. Secondary boycotts: The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the conferees insisted that the report secure the following-rights: . . .

> (c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

105 Daily Congressional Record 16636, September 4, 1959. 2 Leg. Hist. 1721.

On the same day Congressman Udall noted the following on the floor of the House:

> In addition, the conferees wisely set out to plug the few remaining loopholes in the secondary boycott provisions of the Taft-Hartley Act without impinging upon basic rights vital to some segments of the labor movement. Hence, the amendments adopted in conference: . . . (c) protect the free speech right to appeal to consumers by nonpicketing methods.

105 Daily Congressional Record 16637, September 4, 1959. 2 Leg. Hist. 1722.

The House approved the conference report on September 4, 1959, and President Eisenhower signed the bill into law on September 14, 1959. 105 Daily Congressional Record 16653-54; 2 Leg. Hist. 1738-39. Pub.L., No. 86-257.

Several congressmen and Senators published summaries of the final bill. For example, Senator Goldwater, on September 9, 1959, inserted into the Congressional Record a comparison of the Landrum-Griffin bill, the Kennedy-Ervin bill and the conference agreement. With respect to Title VII (amendments to the National Labor Relations Act) and specifically with respect to secondary consumer picketing, this summary analysis stated as follows:

> III. Other secondary boycotts. . .
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> . . .
>
> 4. [House bill-Landrum-Griffin] Prohibits secondary customer picketing at retail store which happens to sell

product produced by manufacturer with whom union has dispute.

. . .

[Conference Agreement] Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott.

105 Daily Congressional Record 17181, September 9, 1959. 2 Leg. Hist. 1454.

Senator Everett Dirksen, the minority leader in the Senate and supporter of Taft-Hartley amendments, stated the following in his "extension of remarks":

> [The bill] bars a union from picketing a retail store to advertise that the store is handling the goods of a firm the union was striking, but permits other forms of such advertising—handbills, for example—if they do not cause the store's employees to stop working or prevent pickups and deliveries.

105 Daily Congressional Record A827, September 18, 1959. 2 Leg. Hist. 1823.

Senator Paul Douglas of Illinois, opponent of Taft-Hartley amendments, noted in an extension of remarks:

> While picketing at secondary-boycott sites is outlawed, the House bill went further and would even have prevented the passing out of handbills or ads in the newspapers. This provision in the House bill was changed so that handbills, radio programs, advertisements, etc., aimed at the public, including consumers, would at least be permitted in these secondary situations. I think that is proper and an exercise of our constitutional rights of free speech.

105 Daily Congressional Record A8372, September 24, 1959. 2 Leg. Hist. 1834.

Senator Goldwater made the following comments in an extension of remarks on October 2, 1959:

> This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B, subject to certain restrictions imposed by the Board. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute. But even this permitted—but limited—type of union activity becomes unlawful if such publicity has an effect of inducing any individual employed by any person other than the producer, company A, in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the secondary employer who is engaged in such distribution, that is, the distributor, company B.

105 Daily Congressional Record A8523, October 2, 1959. 2 Leg. Hist. 1857.